

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP BASKINS,

Defendant-Appellant.

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UNPUBLISHED

July 1, 1997

No. 189606

Recorder's Court

LC No. 94-003864 FC

Before: Cavanagh, P.J., and Doctoroff and D.A. Teeple\*, JJ.

MEMORANDUM.

Defendant appeals by right his bench trial convictions for robbery armed, unlawfully driving away an automobile, and felony firearm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was taken into custody after an exchange of gunfire with a police officer, in consequence of which he was contemporaneously hospitalized. This made defendant reasonably unavailable for a corporeal identification proceeding. See *People v Derbeck*, 202 Mich App 443; 509 NW2d 534 (1993). With respect to the actual photographic identification proceeding, defendant bears the burden, in order to suppress any resulting identification, of establishing that the procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Kurylczuk*, 443 Mich 289, 302-303; 505 NW2d 528 (1993). However, defendant made no effort to introduce the actual photographs used in the proceeding, so the trial court could evaluate them with respect to suggestiveness, and the eyewitness testified that her identification of defendant was based, not on the photographic identification proceeding, but on having viewed him at the time of the crime and on his most remarkable identifying characteristic, a chipped front tooth. The trial court did not clearly err or abuse its discretion in rejecting defendant's contention of impermissible suggestiveness.

However, since defendant was in custody at the time, he had a right to counsel for purposes of that identification proceeding. *People v Kurylczuk*, *supra*, 443 Mich at 302. Assuming defendant's

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\* Circuit judge, sitting on the Court of Appeals by assignment.

right to counsel at the proceeding was violated, the prosecution bears the burden of showing by clear and convincing evidence an independent basis for the in-court identification. *People v Franklin Anderson*, 389 Mich 155, 188; 205 NW2d 461 (1973). Here, the victim's testimony again establishes a satisfactory independent basis, particularly in the absence of evidence that the photographic identification proceeding was unduly suggestive.

Defendant's remaining contention is that the trial court erred in scoring 25 points under OV 2 of the sentence guidelines. At defendant's motion for resentencing, the trial court noted that although it had sentenced defendant within the guidelines, the sentence imposed, without respect to guideline scoring issues, was appropriate to the facts and circumstances of the case. Of itself, this would render moot any issue concerning guideline scoring. *People v Hull*, 437 Mich 868; 462 NW2d 585 (1990). Furthermore, this type of scoring challenge does not present a cognizable basis for appellate relief. *People v Mitchell*, 454 Mich 145; \_\_\_ NW2d \_\_\_ (1997).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Martin M. Doctoroff  
/s/ Donald A. Teeple